87-1354

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,
Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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37pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a libel suit brought by a public figure corporation and involving commentary on a matter of public concern, the award of presumed and punitive damages is barred by the First, Eighth and Fourteenth Amendments to the U.S. Constitution where there is no evidence of actual injury to the plaintiff.

2. Whether, in such a case, a finding of actual malice under *New York Times Co. v. Sullivan* is insufficient to justify the imposition of presumed and punitive damages.

3. Whether the Court of Appeals' finding of actual malice fails the constitutional test of convincing clarity where it is based, in substantial part, on presumptions from missing documents and on the broadcaster's "admission" that he neither believed nor intended the defamatory interpretation argued by the plaintiff.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 827 F.2d 1119 (7th Cir. 1987) and is reproduced at Appendix pp. 1a-49a. The opinion of the U.S. District Court for the Northern District of Illinois on post-trial motions is reported at 644 F. Supp. 1240 (N.D. Ill. 1986) and is reproduced at Appendix pp. 77a-124a. A prior opinion of the Seventh Circuit in this case is reported at 713 F.2d 262 (7th Cir. 1983) and is reproduced at Appendix pp. 55a-75a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Seventh Circuit was entered on August 12, 1987. A timely Petition for Rehearing was denied on November

16, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First, Eighth, and Fourteenth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. Amend. I.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend XIV, § 1.

STATEMENT OF THE CASE

This petition seeks review of a $3,050,000 libel judgment consisting entirely of presumed and punitive damages. No actual damage to the plaintiff, a public figure, was shown. The alleged libel was a commentary by Walter Jacobson [1] on the subject of cigarette advertising and its appeal to young people, which was based on Jacobson's interpretation of a Federal Trade Commission (FTC) report.

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[1] Walter Jacobson is a news anchorman and commentator for WBBM-TV, the Chicago television station that broadcast the alleged libel. CBS Inc. is licensed by the FCC to operate WBBM-TV. CBS Inc. has the following subsidiaries (other than wholly owned subsidiaries): The CBS/FOX Co., CBS/FOX VIDEO Ltd., CBS/MTM Co., Mainstream Communications Corp., and Maindata, Inc. CBS Inc. has no parent companies or affiliates. All parties to the proceedings below are named in the caption.

The plaintiff, Brown & Williamson Tobacco Corporation ("B&W")[2] complained that the broadcast accused B&W of currently using "pot, wine, beer and sex" themes in its advertising to attract young smokers. This accusation was neither intended nor expressly stated in the broadcast. The lower courts, however, accepted B&W's interpretation and found evidence of actual malice, in part, from Jacobson's "admission" that the interpretation he never intended was false.

A. The Broadcast.[3]

The alleged libel was broadcast in the course of "Walter Jacobson's Perspective," a regular feature of the WBBM-TV evening news during which Mr. Jacobson offers his commentary on topics of public interest. The Perspective in question was the last of three dealing with the cigarette industry which were broadcast during the week of November 9, 1981.

Jacobson began by describing in sarcastic terms various cigarette marketing techniques that he believed were intended to appeal to young people. The focus of B&W's complaint was on the portion of the broadcast that followed:

> The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children; that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. Who knows whose fault it is, says the cigarette business.
>
> That's what Viceroy is saying. Who knows whose fault it is that children are smoking? It's not ours. Well, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising. [sic] The Viceroy strat-

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[2] B&W is a large corporation that manufactures and markets "Viceroy," "Kool," and other brands of cigarettes.

[3] A complete transcript of the broadcast as aired is included at Appendix pp. 129a-131a.

egy for attracting young people (starters they are called) to smoking.

"For the young smoker, a cigarette falls into the same category with wine, beer, shaving or wearing a bra," says the Viceroy strategy. "A declaration of independence and striving for self-identity. Therefore, an attempt should be made," says Viceroy, "to present the cigarette as an initiation into the adult world, to present the cigarette as an illicit pleasure, a basic symbol of the growing-up maturity process. An attempt should be made," says the Viceroy slicksters, "to relate the cigarette to pot, wine, beer, sex. Do not communicate health or health-related points."

That's the strategy of the cigarette slicksters, the cigarette business which is insisting in public . . . we are not selling cigarettes to children.

They're not slicksters, they're liars.

App. at 130a-131a (ellipsis in original).

B. Preparation of the Broadcast.

1. *The FTC Report.*

The broadcast was based in large part on confidential portions of a May, 1981 Federal Trade Commission staff report on its cigarette advertising investigation ("FTC Report").[4] The FTC Report quotes a report prepared by Marketing & Research Counselors, Inc. ("MARC"), which summarized research done "to assist [B&W's] ad agency in developing a marketable image for Viceroy cigarettes." App. at 133a. One chapter of the MARC report "focuses almost exclusively on how to persuade young people to smoke." It "recommends a strategy for attracting young 'starters' to cigarette smoking," which includes the language quoted in Jacobson's broadcast. *Id.* at 135a.

[4] Relevant portions of the FTC Report are excerpted at Appendix pp. 132a-141a.

The FTC Report states that "B&W adopted many of the ideas contained in this report in the development of a Viceroy advertising campaign" that ran for six months in three test cities with an advertising budget ten times the normal amount for such a time period. *Id.* at 136a, 137a n.47. The FTC report also states that

> *B&W documents also show that it translated the advice on how to attract young "starters" into an advertising campaign* featuring young adults in situations that the vast majority of young people probably would experience and in situations demonstrating adherence to a "free and easy, hedonistic lifestyle."

Id. at 137a (emphasis added). The "B&W documents" are identified as "Viceroy Marketing/Advertising Strategy." *Id.* at n.48.

2. *Investigation.*

Michael Radutzky, a researcher at WBBM-TV, obtained portions of the FTC Report from a reporter at the Lexington, Kentucky *Herald-Leader*, which had already published a story on the subject entitled "How Brown & Williamson Plotted to Fool Public." He also reviewed a series of articles by syndicated columnist Jack Anderson, which publicized details of the FTC Report and the MARC Viceroy strategy and corroborated the facts in the *Herald-Leader* article.

Radutzky confirmed the authenticity of his partial copy of the FTC Report with the FTC and congressional staff members involved in the cigarette advertising investigation. He also asked for copies of the documents and advertisements mentioned in the report, but these were refused because of confidentiality restrictions imposed during the FTC investigatory process.

Radutzky called Thomas Humber, a public relations officer for B&W, for comment on the FTC Report. According to Humber's memo prepared for B&W management and in-house counsel, he told Radutzky that B&W

had rejected the MARC recommendations, had never requested any advertising based on them, and had terminated the ad agency's work on the Viceroy account, partly as a result of B&W's dissatisfaction with the MARC report. According to the memo, Humber also told Radutzky that he had "thus far been unable to find copies of the proposed ads" and that "to the best of our knowledge no ads as described by the memo were ever actually published." When Radutzky questioned these claims in light of the FTC's conclusion that B&W had adopted many of the MARC recommendations and had translated them into an advertising campaign, Humber's answer, off-the-record, was that he believed the FTC staff was comprised of confirmed antismokers.

Based on this research, Radutzky drafted a preliminary script, from which he and Jacobson planned the final version of the broadcast, including the "visuals" that would be used on the screen during Jacobson's commentary. For the FTC portion Jacobson wanted to use an illustration of the strategy, but Radutzky reported that the ads themselves were unavailable and he was unable to find another example. Excerpts of the FTC Report were therefore shown, with a logo in the bottom right corner of the screen composed of a Viceroy pack and golf ball and clubs copied from a Viceroy ad.

The final script was prepared by Walter Jacobson and broadcast November 11, 1981.

C. Procedural History.

B&W filed suit for libel against Jacobson and CBS in the United States District Court for the Northern District of Illinois on March 16, 1982. On July 6, 1982, the District Court granted petitioners' motion to dismiss the complaint on several grounds, including, *inter alia*, that the broadcast was a fair summary of the FTC report and was capable of innocent construction under

Illinois law.[5] The Court of Appeals for the Seventh Circuit rejected the fair summary and innocent construction arguments and reversed the dismissal without addressing any constitutional issues, 713 F.2d 262 (7th Cir. 1983) (App. at 55a), and the action proceeded to trial.

The action was tried to a jury in a proceeding bifurcated as to liability and damages. At trial, CBS and Jacobson attempted to show that reference to the FTC report on the "Viceroy strategy" was not intended to describe current Viceroy advertising, but was intended to support their opinion that cigarette marketing reflects a conscious strategy to appeal to young people, and to refute the industry's protestations to the contrary. Petitioners also attempted to show that, in any event, B&W *did* attempt to implement the strategy in published test market advertising, as reported by the FTC. The district court's rulings barred petitioners from developing either of these theories before the jury.[6] As a result, the case

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[5] The district court also stated that "to deny this motion would unduly restrict the freedom of the press and the right of a journalist to express opinions freely." App. at 125a.

The destruction of Radutzky's notes, which figured prominently in the later decision of the Court of Appeals, occurred at this point, when Radutzky believed the case was over.

[6] Petitioners had earlier moved for summary judgment on the ground, *inter alia*, that Jacobson's statement "They're not slicksters, they're liars" was an expression of opinion in the context of the broadcast. The motion was denied. In the course of the trial the court admonished counsel and the jury that the issue of opinion had been ruled out of the case and "that the issues in this case are fact not opinion."

The district court also refused to admit into evidence the final MARC report, which included draft advertisements based on the earlier MARC recommendations, because the draft ads themselves had never been published in the media. The excluded final MARC report illustrates the evolution of the MARC Viceroy strategy from obvious sexual and hedonistic themes in the draft ads headlined, "If You Don't Have a Hang-up About Pleasure," to the more polished and subtle versions that *were* published under the caption, "If It Feels Good, Do It, If It Feels Good Smoke It." The final

was submitted to the jury on B&W's interpretation that the broadcast accused it of publishing current advertisements featuring pot, wine, beer and sex themes.

The jury returned a verdict in favor of B&W on liability. During the damage phase of the proceedings, B&W offered no evidence of actual injury resulting from the broadcast.[7] The jury awarded compensatory damages of $3,000,000 against both defendants and punitive damages of $2,000,000 against CBS and $50,000 against Jacobson.

On post-trial motions, the District Court entered judgment N.O.V. as to the compensatory award, reducing it to nominal damages of $1 because of B&W's failure to prove any actual damage from the broadcast.[8]

On appeal, the Court of Appeals affirmed liability, reinstated $1,000,000 as presumed damages, and affirmed the award of punitive damages. The court found that petitioners acted with actual malice because Jacobson's use of the words "Viceroy says" and "the Viceroy strategy" could be interpreted as attributing the pot, wine, beer and sex language to B&W as a current advertising strategy, even though he was aware: (1) that the FTC Report quoted from the Viceroy strategy prepared by MARC; (2) that B&W denied implementing the strategy; and (3) that Radutzky had found no Viceroy ads featuring

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MARC report itself and its accompanying documents refuted B&W's claim that it had rejected the MARC recommendations out of hand.

[7] B&W's only evidence of damage was a third-hand report that some customers reacted negatively following the broadcast; a second-hand report that employees were "shocked" by the broadcast; testimony by a former B&W senior vice president that the broadcast upset his son; and, finally, testimony that any criticism of the tobacco industry may have a tendency to harm the relationship of the industry in general with government regulators.

[8] The district court's opinion on post trial motions is included at Appendix pp. 77a-124a.

"pot, wine, beer and sex." The Court of Appeals found "the most compelling evidence of actual malice" to be Radutzky's destruction of notes, drafts and background materials after he learned the complaint had been dismissed by the district court.

Petitioners' timely petition for rehearing en banc was denied November 16, 1987. App. at 127a. Their motion for stay of judgment pending review by this Court was also denied. App. at 50a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with its clearest opportunity to define constitutional limits on the award of presumed and punitive damages for libel where both *public issues* and *public figures* are involved. This is the third and final step in the Court's analysis which began in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (prohibiting presumed and punitive damages in *public* issue/*private* figure cases)[9] and continued in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (permitting such damages in *private* issue/*private* figure cases).

In both cases, the Court "balance[d] the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting th[e] type of expression" involved. 472 U.S. at 757 (Powell, J., plurality opinion joined by Rehnquist and O'Connor, JJ.). The Court permitted the award in *Dun & Bradstreet* because it had only an "incidental effect . . . on speech of significantly less constitutional interest" than the public issues involved in *Gertz*.

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[9] This prohibition was qualified by the words, "*at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U.S. at 349 (emphasis added). The implications of this clause are discussed at pp. 15-19, *infra*.

Id. at 760.[10] In both cases, however, the Court reaffirmed the strong First Amendment protection of speech on *public* issues and "the limited state interest present in the context of libel actions brought by *public* persons." *Id.* at 756 (quoting *Gertz*, 418 U.S. at 343). The Court has not yet applied its *Gertz/Dun & Bradstreet* analysis to address the constitutionality of presumed and punitive damages in the context of a libel suit involving public figures and public issues.[11] This is the critical issue left open by both decisions and involves speech of the greatest constitutional interest. It should be resolved by the Court.

This case presents the issue in the sharpest possible focus. It involves commentary and opinion on a matter of the highest public concern—cigarette advertising and its appeal to young people. The plaintiff is a public figure corporation—not an individual—actively involved in the controversy, with a huge advertising budget and ready access to national and local media. There was no competent evidence of actual injury to the corporation, yet it received an award of more than $3,000,000—larger

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[10] Even in the context of this *private* libel, however, four members of the Court questioned the constitutionality of presumed and punitive damages. 472 U.S. at 793-794 (Brennan, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens). A fifth member, Justice White, also suggested that First Amendment interests might be served by limiting or entirely prohibiting presumed and punitive damages, as an alternative to the *New York Times* rule. *Id.* at 771 (White, J., concurring in the judgment).

[11] In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 161 (1967), Justice Harlan, writing for a plurality of the Court, rejected First Amendment arguments against a punitive damage award of $400,000 on grounds that the finding of "ill will" required under general libel law, coupled with a heightened standard of liability, was sufficient protection for publishers. However, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), he expressly retreated from that opinion: "Reflection has convinced me . . . that a more precise balancing of the conflicting interests involved is called for in this delicate area." 403 U.S. at 72 n.3 (Harlan, J., dissenting). His dissent in *Rosenbloom* became the cornerstone of the Court's analysis in *Gertz*. See discussion at pp. 18-19, *infra*.

than any libel award ever upheld by this Court—composed entirely of presumed and punitive damages. These facts present the strongest possible argument against the constitutionality of presumed and punitive damages in such libel cases.

I. PRESUMED AND PUNITIVE DAMAGES CONFLICT WITH FIRST AMENDMENT PROTECTION IN LIBEL CASES INVOLVING PUBLIC FIGURES AND PUBLIC ISSUES.

A. First Amendment Interests Are Strongest Where Commentary on Public Issues and Public Figures Is Involved.

The Court has consistently recognized that:

> [S]peech on " 'matters of public concern' " . . . is "at the heart of the First Amendment's protection." . . . . " '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the " 'highest rung of the hierarchy of First Amendment values,' " and its entitled to special protection.

Dun & Bradstreet, 472 U.S. at 758-59 (quoting *First National Bank v. Bellotti*, 435 U.S. 765 (1978) and *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (citations omitted).

Where, as here, speech on public affairs also includes discussion of governmental activities,[12] public figures,[13] and editorial commentary,[14] the balance weighs even more heavily in favor of free speech.

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[12] *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975); *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970).

[13] *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result); *Gertz*, 418 U.S. at 337.

[14] *See FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984); *see also Gertz*, 418 U.S. at 359-60 (Douglas, J., dissenting) (this type of speech "is the reason for the First Amendment since speech which arouses little emotion is little in need of protection").

This Court has found that each of the factors involved in the present case—*i.e.*, discussion of public affairs, interpretation of governmental activities, criticism of public figures, and editorial comment and opinion—*standing alone*, justifies heightened protection under the First Amendment. Where all these elements are combined, only the most compelling state interest could conceivably tip the scales in favor of presumed and punitive damages. No such interest is present here.

B. State Interests in Awarding Presumed and Punitive Damages Are Weakest Where Commentary on Public Issues and Public Figures Are Involved.

Whatever justifications may be offered for presumed and punitive damages in the context of purely private libel are substantially undercut where discussion of public affairs and criticism of public figures is involved. Even in a private figure case involving speech of public interest, the Court in *Gertz* recognized that the "strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury," 418 U.S. at 348-49, and barred the recovery of presumed or punitive damages.[15] The Court reasoned:

> [T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, *the States have no substantial interest* in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

Id. at 349 (emphasis added).

On the subject of punitive damages, the Court stated:

> Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacer-

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[15] *See* note 9, *supra*, and discussion at pp. 15-19, *infra*.

> bates the danger of media self-censorship, but, unlike the former rule, punitive damages are *wholly irrelevant to the state interest* that justifies a negligence standard for private defamation actions. They are not compensation for injury.

Id. at 350 (emphasis added). Stated simply, presumed and punitive damages in libel cases deter speech, and the States have *no* legitimate interest in deterring speech on public issues. The underlying theme of this Court's libel decisions since *New York Times Co. v. Sullivan* has been the need to *encourage* free and open debate and to prevent self-censorship. *See Gertz*, 418 U.S. at 350; *see also Near v. Minnesota*, 283 U.S. 697, 713-20 (1931).

Where, as here, the libel plaintiff is a corporation, there is even less justification for presumed damages, as four members of this Court recognized in *Dun & Bradstreet*, 472 U.S. at 793 n.16 (Brennan, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens). Even the Court of Appeals recognized the irrelevance of B&W's proffered testimony that its employees were emotionally upset: "a corporation is not capable of mental suffering, which ordinarily will be an important component of an individual's damage award for libel." App. at 40a.

Finally, as clearly stated in *Gertz*, the state interest in providing *any* compensation to the plaintiff in a public figure libel proceeding is diminished by the fact that public figures usually have greater access to the media to counter false publicity. 418 U.S. at 344; *see also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). It was the lack of such access by private figures and the perceived need to provide another remedy that led the Court in *Gertz* to permit recovery under a lesser standard than the *New York Times* rule. Even there, however, recovery was limited to compensation for actual injury.

The respondent in the present case, Brown & Williamson, is not merely a public figure. It is a large corpora-

tion that has ready access to the media. It has also been a central and newsworthy figure in the public policy debate concerning smoking and public health, and has more than adequate opportunity to present its side of these issues and to enhance its corporate image through the news media and its own advertising and public relations activities. Under these circumstances the state has no substantial interest in providing monetary awards under such an elusive concept as general damage to corporate reputation, and no interest in awarding presumed and punitive damages where free discussion of public affairs is at stake.

C. The State Has No Legitimate Interest in Providing Compensation for Defamation Where No Actual Injury Is Shown.

The conclusion to be drawn from the Court's analysis in *Gertz* and *Dun & Bradstreet* is that presumed and punitive damages should be prohibited in all cases involving public figures and matters of public interest.[16] But in any event, they should not be awarded in a case such as this, where B&W failed to prove actual injury to its reputation.

Gertz stressed that the state interest in defamation law "extends no further than compensation for *actual injury*." 418 U.S. at 348-49 (emphasis added). If no actual injury is shown, there is no countervailing state interest justifying the burden that an award of damages imposes on free expression. Indeed, the Court suggested in *Gertz* that in the absence of such a state interest:

> this Court would have embraced long ago the view that publishers and broadcasters enjoy an uncondi-

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[16] This view was expressed, even in the context of a private individual plaintiff, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) by Justices Marshall and Stewart. *Id.* at 84, (Marshall, J., dissenting). Justice Marshall joined the majority opinion in *Gertz*. *See also Dun & Bradstreet*, 472 at 771, (White, J., concurring in the judgment).

tional and indefeasible immunity from liability for defamation.

Id. at 341.

At a minimum, where the plaintiff is a public figure *corporation* that has suffered no provable harm, as in this case, the proper balance between First Amendment and defamation law interests falls at the opposite end of the scale from the balance struck by the plurality in *Dun & Bradstreet*.

II. PRESUMED AND PUNITIVE DAMAGES ARE NOT JUSTIFIED BY THE LOWER COURTS' FINDING OF ACTUAL MALICE.

In *Gertz*, this Court prohibited presumed and punitive damages in a *private* figure case, "*at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349 (emphasis added). The Court did not hold that such damages would automatically flow whenever actual malice could be shown; the question simply was not discussed. Rather, with this language the Court carefully confined its holding in *Gertz* to cases involving "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times*." *Id.* at 350.[17]

More importantly, neither *Gertz* nor the subsequent decision in *Dun & Bradstreet* addressed this question in the context of a public figure/public concern libel case, where liability itself is premised on actual malice.

A. There Is No Rational Correlation Between Actual Malice and Presumed Damages.

The doctrine of presumed damages, which allows recovery without evidence of actual injury, was effectively

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[17] *See* Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 n.4 (1985) and cases cited therein ("*Gertz* did not conclusively establish the constitutionality of punitive damages in libel actions").

laid to rest in *Gertz*. The States have *no* substantial interest in awarding damages in excess of actual injury, 418 U.S. at 349; therefore, "all awards must be supported by competent evidence concerning the injury." *Id.* at 350. These conclusions do not magically dissolve where the applicable standard of liability is actual malice. Actual injury to the plaintiff (or lack of it) does not change; the plaintiff's opportunity to demonstrate elements of injury catalogued in *Gertz* is not diminished; nor is the ability of trial courts to frame instructions appropriate to the alleged injury. *Id.* at 350.

Presumed damages in libel cases are nothing more than a vestigial aspect of strict liability, clearly prohibited by the Court in *Gertz*. Strict liability under the common law of libel resulted from a finding that speech in question was "libelous per se," from which the jury was allowed to *presume* falsity, malice, *and damages*. *See Gertz*, 418 U.S. at 371-75 (White, J., dissenting); *see generally* R. Sack, *Libel, Slander, and Related Problems* 39-43 (1980). It was solely on the basis of this now-discredited logic that the Court of Appeals awarded presumed damages of $1,000,000 in the present case:

> Brown and Williamson is entitled in this case to recover under the doctrine of presumed damages *because Jacobson's Perspective was libelous per se.*

App. at p. 40a (emphasis added). No connection was, or could be, suggested between the availability of *presumed* damages in this case and the finding of actual malice.

B. The Lower Courts' Finding of Actual Malice Does Not Justify Punitive Damages.

There *is* an arguable connection between the rationale for *punitive* damages and the truly intentional publication of falsehoods, but such intentional conduct is often missing from findings of actual malice by the lower courts. All too often, the actual malice rule is treated

as nothing more than a semantic hurdle easily overcome by those who would punish "unfair" or "irresponsible" news coverage.[18] When such a finding is also allowed to determine the availability of punitive damages, without any evidence of malice in the traditional sense, the end result is punishment of speech on a *lesser* standard than is applied to the award of punitive damages in other cases. *See Smith v. Wade*, 461 U.S. 30 (1983). Justice Harlan found such a result unjustifiable under "[any] conceivable state interest." *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 73 (1971) (Harlan, J., dissenting).

To some extent, this confusion in the lower courts is understandable. In the early cases following adoption of the actual malice rule in *New York Times*, the Court struggled to educate the lower courts that evidence of ill will, enmity, and intent to inflict harm were not sufficient to establish "actual malice." *See Garrison v. Louisiana*, 379 U.S. at 73; *see also Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Henry v. Collins*, 380 U.S. 356 (1965). From the language of these cases, some courts and commentators have reached the illogical conclusion that "actual malice" does not mean malice at all, and can be established without any indication of intent to harm.[19] A closer reading of this Court's decisions, however, demonstrates that the Court has always intended the rule to reach only truly "malicious" conduct.

From the very beginning, the *New York Times* actual malice rule was intended to protect negligent falsehoods, *New York Times*, 376 U.S. at 271, 272, errors in judgment and interpretation, *Time, Inc. v. Pape*, 401 U.S. at

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[18] *See* Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York 20, 32-36 (Jan./Feb. 1987).

[19] *See* Note, *Punitive Damages and Libel Law*, *supra*, note 17, at 854-55; Report, Committee on Communications Law, *supra* note 18, at 32-36.

292, and even falsehoods that might have been avoided through reasonable investigation, *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968), as long as such conduct did not rise to the level of "deliberate lies" and "calculated falsehoods" uttered with a "high degree of awareness of probable falsity." *Garrison*, 379 U.S. at 74-75. Under these cases, it was the "intent to inflict harm through falsehood" that demonstrated actual malice. *Id.* at 73. The Court has consistently rejected technical arguments of "knowing falsehood" and labels of "reckless disregard" where these elements are missing. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513 (1984); *Time, Inc. v. Pape*, 401 U.S. at 291; *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970).

Justice Harlan's dissenting opinion in *Rosenbloom*, which "formed the cornerstone of the Court's analysis in *Gertz*," *Dun & Bradstreet*, 472 U.S. at 779 (Brennan, J., dissenting) is consistent with this reading of the rule. Justice Harlan expressed what he believed was the *minimum* constitutional restriction on punitive damages as:

> *At a minimum*, even in the *purely private* libel area, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved.

Rosenbloom, 403 U.S. at 73 (emphasis added). But it is clear from the language immediately following this quotation that his reference to "actual malice" also contemplated malice in the traditional sense:

> This [actual malice] is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms

> that are given explicit protection by the First Amendment.

403 U.S. at 73; *see also Dun & Bradstreet*, 472 U.S. at 780 n.4 (Brennan, J., dissenting).

Unless the Court acts, at very least, to limit the availability of punitive damages to those cases of truly malicious conduct involving deliberate lies or calculated falsehoods, the actual malice rule will remain in danger of being used not as a constitutional shield for free speech, but as a weapon used by plaintiffs to exact heavy punishment for innocent errors of judgment and interpretation.

This case provides a striking example of such a result. The Seventh Circuit's analysis of actual malice is almost indistinguishable from the Seventh Circuit's approach condemned by this Court in *Time, Inc. v. Pape*, 401 U.S. at 291:

> This protection [of the *New York Times* rule] would not exist for errors of interpretation were the analysis of the Court of Appeals to be adopted, for once a jury was satisfied that the interpretation was "wrong," the error itself would be sufficient to justify a verdict for the plaintiff.

As in *Pape*, the Court of Appeals relied primarily upon petitioners' alleged misinterpretation of a government report to establish both falsity and "actual malice." Punitive damages were upheld solely as a matter of state law, and solely because of the presence of actual malice: "Punitive damages are available under Illinois law when a plaintiff has proven actual malice." App. at 47a. If *certiorari* is not granted, this result in a case involving a major public figure, an issue of the highest public concern, and a multimillion dollar damage award without proof of any actual injury, will stand as the law in the Seventh Circuit and as a disastrous precedent for other courts.

III. THIS RECORD DOES NOT ESTABLISH WITH CONVINCING CLARITY THAT FALSE STATEMENTS WERE MADE WITH ACTUAL MALICE.

The Court of Appeals reasoned that its finding of falsity and actual malice stripped this case of all First Amendment considerations:

> [T]his case does not involve freedom of the press . . . [b]ecause false statements of fact made with actual malice are not protected by the First Amendment.

App. at 49a. This Court's independent review of these findings required under *New York Times* and *Bose*,[20] is therefore especially critical, as they are tied directly to the damage awards at issue. Review is also critical because the Court of Appeals, despite its declared intent to provide petitioners "the fullest possible review," App. at 49a, overlooked or misread key evidence in its attempt to rationalize the finding of actual malice.

The Court of Appeals found proof of actual malice in "the distortion of the FTC Report, Brown & Williamson's denial, and the corroboration of the denial," together with the "unexplained selective destruction" of notes and background materials by Radutzky. App. at 36a-37a. These characterizations do not accurately reflect the evidence, and they do not, either singly or in combination, establish actual malice with convincing clarity.

What the Court will find upon its independent review of the record is, at very most, an arguably mistaken belief by Jacobson that the makers of Viceroy had implemented a strategy, based on the MARC recommendations for reaching young smokers. The supposed "distortion" was in fact a perfectly reasonable interpretation of the FTC Report; B&W's "denial" was equivocal at best and contradicted by the FTC's findings; and Radutzky's so-

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[20] *See Bose Corp. v. Consumers Union*, 466 U.S. at 499; *New York Times Co. v. Sullivan*, 376 U.S. at 284-86.

called "document destruction" was neither "unexplained" nor "selective." More importantly, the lower court's findings of falsity and actual malice were based entirely on only one of several *interpretations* of the broadcast, not on clear misstatements of fact.

A. Actual Malice Is Not Established With Convincing Clarity Where the Finding of Falsity Is Based on Matters of Interpretation and Opinion.

In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), this Court conclusively established that the plaintiff in a defamation case involving matters of public concern must prove falsity of the challenged statements. 475 U.S. at 776. It logically follows from both the reasoning of that decision and sound First Amendment principles that where actual malice is involved, falsity must be shown with convincing clarity.[21] This means showing not only that the statements made were false, but also that the allegedly false statements were actually made.

The alleged falsehood in this case—that B&W featured pot, wine, beer and sex themes in its advertising, does not appear as a statement of fact anywhere in petitioner's broadcast. It depends entirely on B&W's interpretation and does not take into consideration other, more reasonable interpretations consistent with the expression of Jacobson's opinion that the cigarette industry's appeal to young people is intentional.

The lower courts in this case were unwilling to deal with the complex issues of opinion on any but the most

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[21] *See Hepps*, 475 U.S. at 773, 779 n.4; *Bose*, 466 U.S. at 511 (question on review is "whether the evidence in the record . . . is of the convicing clarity required to strip the utterance of First Amendment protection"); *Garrison v. Louisiana*, 379 U.S. at 74 ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned"); *see also Speiser v. Randall*, 357 U.S. 513, 525-526 (1958).

mechanical terms, particularly where interpretation of the entire broadcast was involved. *See* App. at 18a-22a and 103a-106a. They failed to recognize that issues of opinion are not technical defenses, but are inseparable from the determination of truth and falsity. *See Gertz*, 418 U.S. at 340; *see also Bose*, 466 U.S. at 514.

The facts of this case highlight the critical need for a clear ruling from this Court that falsity must be shown with convincing clarity in public figure/public interest libel actions, particularly where the free-wheeling rhetoric of commentary is open to interpretation. If statements concerning public figures and public affairs may legitimately be read as opinion, hyperbole, satire, or any other form of nonfactual speech, they must be given the breathing space necessary to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. Liability must be confined to those utterances that are clearly and convincingly intended to convey false statements of fact. Indeed, this is the underlying rationale of this Court's holdings on the issues of "opinion" in *Gertz*, 418 U.S. at 339-340, and "rhetorical hyperbole" in *Greenbelt*, 398 U.S. at 14-15. Where, as here, the truth or falsity turns on legitimately disputed interpretation in the debate, the balance should be tipped in favor of First Amendment protection. *See Hepps*, 475 U.S. at 776-77.

B. The Court of Appeals' Finding of Actual Malice Is Not Supported by the Record.

1. *"Distortion" of the FTC Report.*

Jacobson used the phrases "Viceroy says" and "the Viceroy strategy" in quoting from the "pot, wine, beer and sex" language of the MARC Viceroy strategy. From this, the Court of Appeals found a knowing and intentional "distortion" of the FTC Report. However, Jacobson's presentation was at least a rational interpretation

of the FTC's conclusion that B&W *had* adopted many of MARC's ideas and "translated the advice on how to attract young 'starters' into an advertising campaign . . . demonstrating adherence to a 'free and easy, hedonistic lifestyle,'" based on evidence identified as "B&W documents" entitled "Viceroy Marketing/Advertising Strategy." App. at 137a & n.48.

The reasoning of the Court of Appeals repeats the very error condemned by this Court in *Time, Inc. v. Pape*, where a reporter's interpretation of a government report, "though arguably reflecting a misconception," was "one of a number of possible rational interpretations" of the report and was held not evidence of actual malice. 401 U.S. at 290. Otherwise, this Court concluded, the protection of the actual malice rule would be meaningless, "for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." *Id.* at 291.

Given the facts of this case, this last observation by the Court was prophetic. The Court of Appeals held that actual malice was established by Jacobson's attribution of the MARC recommendations to Viceroy "since he admitted that he knew the statement was made by MARC rather than by Viceroy." App. at 33a.

2. *Brown & Williamson's Denial.*

B&W's denials did not give Jacobson and CBS any serious reason to doubt the accuracy of the broadcast. The statements by B&W's public relations officer were equivocal at best and were directly contradicted by the FTC's conclusion that B&W *had* published advertising based on the MARC recommendations. B&W's explanation for the discrepancy, that the FTC staff were "avid anti-smokers," did nothing to resolve the conflict.

Jacobson's decision to believe the FTC Report instead of B&W's public relations officer does not indicate sub-

jective doubts as to the accuracy of the broadcast. *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1112 (N.D. Cal. 1984).

3. *Failure to Find "Pot, Wine, Beer and Sex" Ads.*

The Court of Appeals accepted B&W's interpretation that the broadcast accused Viceroy of running pot, wine, beer and sex ads. From this misinterpretation the finding of actual malice followed as a matter of course: Radutzky found no ads featuring pot, wine, beer and sex, so he and Jacobson must have known that their accusation was false. Of course, if it is not clear that the accusation was intended, or even made, knowledge of falsity and evidence of actual malice also are not clear.

Radutzky and Jacobson believed from discussions with FTC and Congressional staff members that there were ads based on the MARC recommendations, and they knew from the FTC Report itself that Viceroy had run such an advertising campaign. No source except B&W suggested that such ads did not exist; they simply could not be made available because of confidentiality limitations on the FTC investigation. Failure to find examples of the strategy among current ads in the Chicago area [22] could not negate the FTC's conclusion that the Viceroy strategy had been adopted and translated into an advertising campaign, nor did it change Jacobson's belief that such a strategy existed.

4. *"Selective" Document Destruction.*

The Court of Appeals found Radutzky's destruction of documents the "most compelling evidence of actual malice." App. at 28a. According to the court, "Radutzky

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[22] The ads in question were run in Knoxville, Tennessee; Orlando, Florida; and Wichita, Kansas, facts that were unknown to Radutzky at the time.

had no explanation for why he destroyed only certain parts of the documents," and from this, the jury was "almost compelled" to conclude that Radutzky's explanation for destroying his notes "was a complete fabrication . . . [because] [n]obody cleans house as *selectively* as Radutzky did." App. at 31a (emphasis added). This misconception in turn led to the holding that "[b]ecause Radutzky destroyed the documents in bad faith, the jury was allowed to infer that the destroyed documents would have seriously damaged the defendants' case." *Id.* The court simply ignored Radutzky's explanation that he did not deliberately keep the documents that were eventually produced; rather, after the case was reinstated by the Seventh Circuit, he found the additional pages that were produced.

Even if the Court of Appeals' finding of bad faith is accepted for the sake of argument, the document destruction still does not supply the missing proof of actual malice. Destruction of documents gives rise to an inference against the party destroying the documents, but the inference "will not supply a want of proof of a particular fact essential to the proponent's case."[23] E. Cleary, *McCormick on Evidence* § 273 at 810 & n.20 (3d ed. 1984). Indeed, this Court has held that although discredited testimony may be disregarded by the trier of fact, it "does not constitute clear and convincing evidence of actual malice." *Bose*, 466 U.S. at 512; *see also Speiser v. Randall*, 357 U.S. at 526 ("The power to create presumptions is not a means of escape from constitutional restrictions").

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[23] Even this limited inference from Radutzky's destruction of documents does not arise against the petitioners here—Jacobson and CBS. The inference runs against the *party* responsible for the destruction. *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985). Radutzky is not a party to this action. His actions cannot be imputed to Jacobson nor, under the normal rules of agency law, to CBS, because they were contrary to CBS policy.

IV. THE AWARD OF PRESUMED AND PUNITIVE DAMAGES ALSO VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The award of presumed and punitive damages in this case presents the Court with the same serious issues under the Due Process clause of the Fourteenth Amendment and Excessive Fines clause of the Eighth Amendment that it has already confronted in the ordinary tort context in *Banker's Life & Casualty Co. v. Crenshaw*, No. 85-1765 (oral argument Nov. 30, 1987) and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). However, when First Amendment values are involved, these concerns are magnified and are often subsumed in the First Amendment analysis. *See Gertz*, 418 U.S. at 350. Indeed, concerns about due process and excessive punishment of speech are persistent themes throughout this Court's libel decisions. In one sense, therefore, it is impossible to separate these issues from First Amendment considerations where the subject matter is speech on matters of public concern. In another sense, however, it is entirely possible to find that awards of presumed and punitive damages are unconstitutional solely on the basis of their failure to satisfy minimum requirements of due process and their tendency to be used as private civil fines in unrestrained and excessive amounts.

Due process requires, at a minimum, that economic burdens imposed by a state bear some rational relationship to a legitimate state interest and be imposed in a manner that is neither arbitrary nor irrational. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 476-77 (1985). Absence of the requisite state interest is discussed at pp. 12-15, *supra*. However, even if this substantive requirement could be met, due process also requires that the *procedures* by which such burdens are imposed be "adequate to safeguard against infringement of constitutionally protected rights." *Speiser v. Randall*, 357 U.S. 513, 521 (1958);

see Freedman v. Maryland, 380 U.S. 51 (1965); *Smith v. California*, 361 U.S. 147 (1959).[24] Despite the harshly punitive nature of these damage awards, libel defendants have none of the protections offered criminal defendants.[25]

Standardless and deferential appellate review aggravates the problem. Appellate courts generally refuse to disturb a jury's award of these damages that is not "monstrously excessive," "disproportionate," "destructive," "inflamed by passion and prejudice," or so large as to "shock the judicial conscience." None of these so-called standards would be adequate to sustain a criminal penalty against a due process challenge, yet they are regularly applied in review of punitive damage awards.[26] The rule has become "if it feels wrong, send it back."

The constitutional flaws of this kind of review are exemplified in the present case. The Court of Appeals held that because the jury had awarded *only* $5,050,000 of the over $17,000,000 presumed and punitive damages requested, it was not "mere putty in the hands of the plaintiff" and was not swayed by "passion and prejudice." App. at 45a. The Court of Appeals also sus-

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[24] *See also* Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 616 and n.46, 618 (1986); Report, Committee on Communications Law, *supra* note 18 at 37-40; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 288-291 (1983).

[25] *See New York Times v. Sullivan*, 376 U.S. at 277; *Bantam Books v. Sullivan*, 372 U.S. 58, 69-70 (1963); *see also Speiser v. Randall*, 357 U.S. at 521-522.

[26] *See Gertz*, 418 U.S. at 350; *Brown & Williamson v. Jacobson*, 827 F.2d at 1141; *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1143-44 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1275 (7th Cir. 1983); *Braun v. Flynt*, 726 F.2d 245, 257 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984); *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1975).

tained the punitive damage award because it was not "destructive" and did not burden the defendants "with a debt that [they] cannot easily discharge." *Id.* at 48a.

The award of presumed damages was justified by the Court of Appeals with the remarkable assertion that $1,000,000 is not "substantial." The Court admitted that the " '[a]scertainment of presumed general damages is difficult at best and unavoidably includes an element of speculation," *id.* at 41a (quoting *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511 (10th Cir. 1987)), and is inherently "very inexact and somewhat arbitrary," *id.* at 47a.

The same defects that should invalidate presumed and punitive damages under the Fourteenth Amendment are also fatal under the Eighth Amendment. Fines are "excessive" under the Eighth Amendment if they are disproportionate to the harm inflicted and to other punishments for the same conduct. *Solem v. Helm*, 463 U.S. 277, 284 (1983).[27] Presumed and punitive damage awards unconfined by any adequate standards result in disproportionate and excessive private fines. *See Gertz*, 418 U.S. at 349-50; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 82-83 (Marshall, J., dissenting); *see also* Report, Committee on Communications Law, *supra* note 18, at 39-40.

The Court is here confronted with a multimillion dollar judgment in favor of a public figure corporation that has suffered no provable damage, yet the award was upheld under vague rules that the jury not be "mere putty in the hands of the plaintiff" and that the punishment not be "destructive". Whether this is viewed as a problem of due process under the Fourteenth Amend-

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[27] Although *Solem* is a cruel and unusual punishment case, the "Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments." 463 U.S. at 289.

ment, an excessive fine prohibited by the Eighth Amendment, or an infringement of the First Amendment, it is unquestionably an unconstitutional result that must be addressed by the Court.

CONCLUSION

Presumed and punitive damages are far too dangerous a weapon to be used against commentary on public concerns, especially where no actual injury to the public-figure plaintiff can be shown. The decision of the Court of Appeals, if left uncorrected, stands as a dangerous departure from both the letter and intent of this Court's decisions protecting discussion of public affairs. It permits massive damage awards without proof of actual injury; it finds actual malice based on inference, presumption, and differences of interpretation; and from this, it concludes that "this case does not involve freedom of the press." App. at 49a.

The result in this case not only *involves* freedom of the press; it threatens that freedom where it is most in need of protection, and should be reviewed by this Court.

Respectfully submitted,

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